Supreme Court, U.S.
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No. 07-___ 07-555

In The
Supreme Court of the United States

LINDA ROSENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article I, section 8 vests Congress with the exclusive power to lay and collect taxes. Section 8 further limits Congress' tax powers by requiring "uniform" excise taxes. Congress delegated its limited power to collect federal communications excise tax to the Internal Revenue Service. The IRS has recently conceded that its collection of the federal communications excise tax from 1979 to 2006 was without statutory authority and unlawful. IRS Notice 2006-50. The questions presented are:

1. Whether Article I, section 8 of the Constitution only limits the power of Congress, or whether it also limits the power of an agency purporting to act under Congressional authority?

2. Whether the IRS is constitutionally insulated from the Takings Clause of the Fifth Amendment when the IRS knowingly "takes" citizen's money in excess of its delegated authority?

PARTIES AND RULE 29.6 STATEMENT

Petitioner is Linda Rosenberg, a natural person living in California. The respondent is the United States of America. Rule 29.6 does not apply because none of the parties are corporations.

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PETITION FOR A WRIT OF CERTIORARI

Linda Rosenberg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The court of appeals did not render an opinion. App., *infra*, 1a. The decision and opinion of the United States Court of Claims (App., *infra*, 2a-25a) is reported at 72 Fed. Cl. 387 (Aug. 3, 2006).

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2007. A petition for rehearing was denied on July 25, 2007. App., *infra*, 25a. The petition for a writ of certiorari was filed on October 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8 of the United States Constitution, provides, in part, that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

2. The Fifth Amendment to the United States Constitution provides, in part, that "nor shall private property be taken for public use, without just compensation."

STATEMENT

Petitioner Linda Rosenberg, a school teacher in California, filed a complaint in the Court of Federal Claims for herself and all others similarly situated to recover all amounts that the IRS had collected as a purported "federal excise tax" on long distance telephone calls. Billions of dollars of such excise "taxes" were collected from the public each year. Petitioner claimed that there was no statutory authorization for such a tax, and that courts in the Federal,[1] D.C.,[2] Second,[3] Third,[4] Sixth,[5] Seventh,[6]

[1] *Honeywell Intl., Inc. v. United States*, 64 Fed. Cl. 188 (Fed. Cl. 2005); *America Online, Inc. v. United States*, 64 Fed. Cl. 571 (Fed. Cl. 2005).

[2] *National Railroad Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005).

[3] *Fortis, Inc. v. United States*, 447 F.3d 190 (2nd Cir. 2006).

[4] *Reese Bros., Inc. v. United States*, 447 F.3d 229 (3rd Cir. 2006); *PNC Bank, N.A. v. United States*, 2006 WL 1604678 (W.D. Pa. 2006).

[5] *Office Max, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005); *Office Max, Inc. v. United States*, 309 F. Supp.2d 984 (N.D. Ohio 2004).

[6] *Service Master Co. v. United States*, 2006 WL 1343436 (N.D. Ill. 2006).

Ninth[7] and Eleventh Circuits[8] have so held. Petitioner sought to recover compensation for these amounts as a taking under the Fifth Amendment, and alternatively as a violation of the uniformity clause because she (and the class) had been treated differently than the successful litigants who have prevailed against the Government in refund litigation. The Government, conceding the lack of statutory authority for the collection of these amounts, nonetheless moved to dismiss the complaint for lack of subject matter jurisdiction. App., *infra,* 9a.

The District Court granted the Government's motion on jurisdictional grounds on August 3, 2006. It held that Rosenberg could not make out a "takings" claim without admitting that the taking was authorized, and further ruled that in any event there is a per se rule that a "tax is not a taking." App., *infra,* 19a. In addition, the District Court found that the Uniformity Clause applies only to Congress, not to the IRS, and therefore it has no jurisdiction to hear a Uniformity Clause challenge to the actions of the IRS in collecting excise taxes against some but not all taxpayers. App., *infra,* 24a. The Court of Appeals for the Federal Circuit affirmed without opinion.

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[7] *Hewlett Packard Co. v. United States*, 2005 WL 1865419 (N.D. Cal. 2005).

[8] *American Bankers Insurance Group v. United States*, 408 F.3d 1328 (11th Cir. 2005).

Although multiple federal courts had determined that the IRS was not permitted to collect this tax, the IRS insisted it had the right to do so, stating that "this notice confirms that the Service will continue to assess and collect the tax under § 4251 on all taxable communications services, including communications services similar to those at issue in the cases." *Id.* The IRS further demanded under penalty of law that taxpayers "are required to pay the tax to a collecting agent (the person receiving the payment on which tax is imposed), and collecting agents are required to pay over the tax to the United States Treasury and to file the required returns." *Id.*

Throughout this period of time, the IRS asserted its right to non-acquiesce to the decisions of the federal judiciary – even in the federal appellate circuits in which they were rendered. App., *infra*, 6a. The government forcibly collected billions per year that were not in fact taxable items. The IRS has estimated that it collected these "taxes" from more than 165 million American taxpayers. General Accounting Office, *Telephone Excise Tax Requests Are Fewer Than Projected And Have Had Minimal Impact On IRS* (April 2007).

On May 26, 2006, the IRS finally conceded the federal excise tax ("FET") does not apply to modern telecommunication services. IRS Notice 2006-50; App., *infra*, 9a. Notice 2006-50 acknowledged that the federal courts were correct and must be obeyed eventually. *Id.* However, the IRS did not order its agents to immediately cease collecting the FET. *Id.* at

§ 4(C). Instead, the IRS authorized its agents to continue to collect the FET through July 31, 2007. During this period of time, the sovereign knowingly and unlawfully collected millions in FET from its citizens.

The IRS has not attempted to return the full amount of the FET. Instead, the IRS has taken the position that it is entitled to keep these illegal taxes for every year except the last three years. Moreover, even for this time period, the IRS claims that it need not refund even these illegal taxes unless specifically requested to do so by each individual taxpayer, and then only a de-minimis "safe harbor" amount was readily attainable. The IRS created an administrative request procedure which requires every taxpayer to take affirmative steps. Notice 2006-50, § 5. Thus, in order to receive a refund of their own money – money which never should have been taken in the first instance – citizens have to complete a bureaucratic form and submit their request to the state.

According to the General Accounting Office, only 1.7% of individuals without a tax filing obligation filed the new forms. General Accounting Office, *Telephone Excise Tax Requests Are Fewer Than Projected And Have Had Minimal Impact On IRS* (April 2007). Similarly, less than 2% of corporate filers requested the refund. *Id.* Even as to professionally-prepared returns, over half failed to request a refund of monies. *Id.* Personally prepared returns requested even less. *Id.*

On September 26, 2007, the Treasury Inspector General for Tax Administration recognized that millions of citizens will never get their money back from their sovereign. Treasury Inspector General for Tax Administration, *"Although Strong Efforts Were Made, A Significant Amount of the Telephone Excise Tax Overcollected from Individual Taxpayers May Never Be Refunded,"* Doc. Ref. No. 2007-30-178 (September 26, 2007). Solely for the category of "individual taxpayers", the government expects to keep over $ 3 billion which should have been refunded. *Id.* This does not include the taxes owed to large and small businesses. *Id.*

REASONS FOR GRANTING THE PETITION

This country was founded in no small part because of illegal taxes collected by the English Crown. Our constitution protects citizens from illegal taxes imposed by their sovereign. Limiting the government's taxing power is a core value in our democracy. Yet Americans have paid billions in purported excise taxes which even the government agrees should not have been collected. This case is about whether the Court of Federal Claims has jurisdiction to hear a case by its citizens to recover these illegal exactions.

The Fifth Amendment and Uniformity Clause are "money-exacting" provisions which allow for suit by citizens against the government, as even the lower

court recognized. App., *ibid.*, 16a. The reasons expressed in the opinion of the Court of Federal Claims for not applying these basic constitutional provisions are unsound, and will result in the de facto ratification of IRS' conduct in mulctin billions from the public without any statutory authority.

A. The Federal Circuit's Refusal to Consider Controlling Precedent as To Whether Forced Exactions, Unauthorized by Statute, Are Compensable "Takings" Under the Fifth Amendment Warrants this Court's Review

The Federal Circuit affirmed without comment or opinion the lower court's decision that there was no "taking" because the Petitioner "has not admitted that the IRS's collection of excise tax on her toll telephone service was authorized." *Rosenberg*, 72 Fed. Cl. at 394, App., *infra*, 19a. To make such an admission would seemingly be self-defeating to Petitioner's claim. Unfortunately, there is considerable confusion in the lower courts as to the necessity of such an admission in order to state a takings claim.

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that "nor shall private property be taken for public use, without just compensation." A "classic taking" occurs whenever the government acquires for itself the property of another. *United States v. Security Industrial Bank*, 459 U.S. 70, 77, 103 S.Ct. 407, 412 (1982).

There is no provision in the Takings Clause that specifically refers to "authorized" or "unauthorized" acts. These words do not appear in the Fifth Amendment. However, courts have distinguished between acts committed on behalf of the government and acts committed by government agents for their own personal enrichment. *See e.g. Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 151 (D.C. Cir. 1983) (Scalia, J.), *rev'd*, 745 F.2d 1500 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985). Acts by government employees for their own benefit or outside scope of their duties create tort actions against the individuals involved. Acts on *behalf* of the government create claims against the government. Unfortunately, many lower courts have used the word "authorized" to describe this distinction. As a result, this phrasing has created widespread confusion and conflict among the Federal Courts.

In addressing this issue, the Supreme Court has tried to explain that "a state officer may be said to act *ultra vires* only when he acts 'without any authority whatever,'" that is, without even a colorable claim of legality. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984). "Actions taken outside the normal scope of agency responsibilities are considered *ultra vires*." *Pi Electronics Corp. v. United States*, 55 Fed. Cl. 279, 288 (2003). For example, there is no "takings" claim against the government when a rogue agent, acting on his own initiative, seizes the property of a citizen, because it

cannot be said that the government itself took the property, and hence should not have to buy it.

Conduct is considered "authorized" for purposes of a Tucker Act claim when its employees act generally within the scope of their duties, or when the government's actions are pursuant to "the good faith implementation of a Congressional Act," or are "a natural consequence of congressionally approved measures." *NBH Land Co. v. U.S.*, 576 F.2d 317 (Ct. Cl. 1978).

As Judge (now Justice) Scalia explained for the panel in *Ramirez de Arellano v. Weinberger,* 724 F.2d 143, 151 (D.C. Cir. 1983), *rev'd,* 745 F.2d 1500 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds,* 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985), "the mere fact that a government officer has acted illegally does not mean he has exceeded his authority for Tucker Act purposes, even though he is not 'authorized' to break the law." A Tucker Act remedy lies if a taking occurs while the government officer "is acting within the normal scope of his duties . . . unless Congress has expressed a positive intent to prevent the taking or to exclude government liability." *Id.* Thus, as this Court, and the D.C. Circuit, have made clear, a Takings Claim will exist if the government agent is acting on behalf of the government, even if his actions are unlawful.

The lower court's opinion fundamentally confused the concept of "authorization" as defined by Justice Scalia. Petitioner alleged that the IRS is authorized

to collect taxes and that the collection of an FET by the telecom companies was generally authorized by the IRS. It is also clear that the IRS was *purporting* to act on behalf of the government because all tax revenues were remitted to the treasury and that the treasury has kept the citizens' money.

The lower court thought that because Petitioner alleged that the IRS was in violation of Article I, Section 8, that therefore, its agents must not be acting on behalf of the government, citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001). The word "authorization" does not appear in the Fifth Amendment. The concept has been created solely for the purpose of differentiating between takings on behalf of the sovereign and takings for the personal benefit of the sovereign's agents. The lower federal courts continue to misunderstand this concept, and this is an issue of sufficient importance to warrant review by this court.

This concept has jurisprudential implications which far exceed the billions of dollars at issue. The question is whether the government may take the money of its citizens without statutory authorization. The Constitution, which seems to address this question, is of little import if courts decline to hear such claims for lack of jurisdiction.

B. The Adoption of a Per Se Rule Labeling an Exaction as a Tax Insulates it from Fifth Amendment Scrutiny Conflicts with this Court's Holding in *Brushaber*

The lower court's opinion adoption of a per se rule against applying Fifth Amendment scrutiny to "taxes" conflicts directly with *Brushaber v. Union Pac. RR*, 240 U.S. 1 (1916) ("*Brushaber*"). The lower court held that "assuming *arguendo*, that Plaintiff admitted that the IRS' actions were authorized, a tax is not a taking." *Rosenberg*, 72 Fed. Cl. at 394. In contrast, this Court held in *Brushaber* that although the general collection of taxes is not typically a taking, that an exception to the rule exists and that taxation will constitute a taking where:

> [T]he act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.

Id. pp. 24-25.

This has always been good law. *Nichols v. Coolidge*, 274 U.S. 531 (1927) ["tax may so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment"]; *Nationsbank of Texas, N.A. v. U.S.*, 269 F.3d 1332, 1336 (Fed. Cir. 2001) ("A retroactive tax can constitute a taking under the Fifth

Amendment of the Constitution if the retroactive feature makes it 'so arbitrary and capricious' as to amount to confiscation."); *The United States Shoe Corp. v. United States*, 296 F.3d 1378, 1384 (Fed. Cir. 2002) [recognizing the exception that a tax might be "so arbitrary that it was an egregious violation of due process and therefore, a taking"].

While "the general tax levied by the Internal Revenue Code does not offend the Fifth Amendment," the government may not use its taxation power "to achieve . . . what the Takings Clause of the Fifth Amendment forbids if done directly." *Coleman v. Comm'r*, 791 F.2d 68, 70 (7th Cir. 1986). The sweeping conclusion that taxation can never constitute a "taking" conflicts with *Brushaber* and the holdings in *Nichols*, *Nationsbank,* and *The United States Shoe Corp.*, *supra*.

This case is even more aggravated than *Brushaber*. Here, there was never any tax authorized by Congress. Thus, the IRS' actions are not the collection of a tax – unless the IRS can create "taxes" that are not authorized by either the Constitution or the Congress. The actions of the IRS are simply an unlawful governmental taking.

Because the lower court did not consider the correct legal standard, it did not consider whether the complaint, liberally construed, pleaded the *Brushaber* exception. Here, Petitioner has expressly alleged that her claims meet the exception for a "taking" through taxation.

To the extent that the IRS' actions constitute "taxation," these actions are arbitrary and capricious. Beginning in 1979, the IRS recognized that long distance service was no longer taxable under the statute. Despite knowing that it lacked Congressional authorization, the IRS continued to collect the FET after 1979. *Office Max, Inc. v. United States*, 309 F. Supp.2d 984, 996 (N.D. Ohio 2004) citing Rev. Rul. 79-404, 1979 WL 51192. Then, the United States Courts of Appeals began to unanimously rule that the IRS' actions were illegal. *See e.g. American Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005). Nonetheless, the IRS announced that it would not acquiesce to the authority of the federal courts and ordered tax collectors to continue to collect the FET even in the appellate districts which had ruled such collection to be unlawful. IRS Notice 2005-79.

The IRS' final actions were equally arbitrary and capricious. On June 19, 2006, the IRS admitted that its actions were unlawful. IRS Notice 2006-50. However, it continued to allow its collectors to bill for the FET for phone calls made through July 31, 2006, and collected many months later.

The IRS' actions were not the collection of any approved tax. However, if they were, the IRS' actions were arbitrary and capricious in 1979 when they recognized the change in statute. They were arbitrary and capricious in 2005 when the IRS announced that it would not follow the decisions of the federal appellate courts. Certainly, they were arbitrary and capricious

in 2006 when the IRS collected taxes even after admitting that it was not authorized to do so.

Petitioner's allegations satisfy the *Brushaber* exception. This Court should grant certiorari in order to reconcile the Opinion's conflict with *Brushaber* and should reverse and remand this case for a hearing on the issue of whether Petitioner can prove its allegations of arbitrary confiscation.

C. The Court of Federal Claims' Decision that the Uniformity Clause Applies only to Congress, and Not to the Agency that Collects the Revenue, Warrants this Court's Review

Petitioner seeks recovery of the purported excise taxes she paid because the IRS' conduct in collecting them from her but not from the numerous successful litigants constitutes a violation of the Uniformity Clause in Article I, Section 8, of the United States Constitution. Article I, Section 8 is the cornerstone provision from which the power to "levy and *collect*" taxes emanates. The trial court rejected Petitioner's claim under the Uniformity Clause only because of its conclusion it applies just to Congress, and not to the IRS. *Rosenberg*, 72 Fed. Cl. at 395-396, App., *infra* 12a. The court cited no authority for this conclusion. *Id.*

In finding that Article I, Section 8 does not address the actions of the IRS in administering tax collection, the court ignored both the wording of the Uniformity Clause, as well as the longstanding body of case law

requiring the IRS to collect taxes uniformly, without discrimination, and in accordance with the Constitution.

The Tax Clause expressly states that Congress has power to "lay and *collect* . . . Excises" and that all "Excises shall be uniform throughout the United States". Article I, Section 8 (emphasis added). Thus, by its terms, the Tax Clause requires tax collection to be uniform throughout the United States. The Opinion below creates a split with other federal courts which have expressly held that the IRS is bound to *collect* taxes uniformly. In *U.S. v. Hester*, 137 F.2d 145, 147-48 (10th Cir. 1943) the court noted that: "a necessary incident of the power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end."

Indeed, the rule was stated even more directly by the court in *In re Hollenbeck*, 166 BR 291 (S.D. Tex. 1993) as follows:

> The power of the IRS to collect taxes is grounded in Art. I, Section 8 of the Constitution. . . .
>
> Congress has entrusted the Department of the Treasury and derivatively the IRS with broad power to enforce our revenue laws. . . . The power to collect, however, is not an unrestricted power. The government must abide by the laws of the United States, including constitutional, statutory and

> decisional constraints against unequal treatment.

Id. at 294.

Similarly, in *IRS v. Blais*, 612 F. Supp. 700, 703 (D. Mass. 1985) the court held that the government's authority to collect taxes is subject to the constitutional and statutory constraints against unequal treatment. Indeed, any rule to the contrary would make no sense. As the court noted in *Blais, supra*: "[t]he law abhors power without accountability. Unpoliced power invites abuse and corruption." *Id.* at p. 704. If the IRS was not bound to collect taxes uniformly, it could make collection decisions based upon invidious or legally improper criteria. Taxation is a powerful right vested in the government and the Tax Clause ensures that it cannot be used to discriminate against political enemies or afford preferential treatment to political allies. Indeed, the trial court's analysis leads to absurd results.

For example, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Under the analysis of the court below, only Congress, not the executive branch, is subject to the First Amendment. Thus, if the trial court's reasoning were applied, the executive branch could promulgate regulations that abridge free speech with impunity. Such a construction would, of course, render the First Amendment meaningless. Courts have never agreed with the trial court's extremely unusual reasoning. For example:

> Petitioner argues that the (FCC's) regulations . . . violate the First Amendment. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." Although the text of the First Amendment refers to legislative enactments by Congress, it is actually much broader in scope and encompasses, among other things, regulations promulgated by administrative agencies.

U.S. West, Inc. v. FCC, 182 F.3d 1224, 1231-32 (10th Cir. 1999) (noting that an agency's interpretation of the delegating statute is subject to constitutional review). Under the trial court's reasoning, the guarantees of freedom of speech, freedom of religion, freedom of the press, freedom of assembly and right to petition the government would only apply to Congress, while allowing executive branch agencies to infringe these rights without a Constitutional violation. Just as the FCC cannot violate the First Amendment's guarantee of free speech, the IRS cannot violate the tax clauses of the Constitution. The trial court's opinion to the contrary is erroneous and should be reversed.

The notion that the Uniformity Clause does not apply to the federal agency charged with the collection of taxes might surprise the Framers. Here the IRS knowingly collected a tax on items which it conceded were not taxable under the law. *See Office Max, supra.* It is no different than if the IRS had simply created out of whole cloth a tax without the approval of Congress. It is a disturbing misinterpretation of

the Constitution on a point that was fundamental at the time of our country's birth, and is still fundamental.

Congress often acts through federal agencies. To refuse the Constitution's protections to agencies which are charged with execution of the will of Congress would substantially eviscerate those protections. The ramifications of this approach would be far-reaching. Article I is not limited to taxation. Article I is the source of authority for the government to borrow money (Art. I, § 8, cl. 2); create uniform naturalization rules (Art. I, § 8, cl. 4); establish limited patents and copyrights (Art. I, § 8, cl. 8), and other powers. Thus, allowing administrative agencies to escape compliance with Article I has far-reaching and serious consequences.

Our republic was founded to create a government that was controlled by the people, and in particular to limit and regulate the collection of taxes. According to the IRS, this case affects up to 165 million individual taxpayers, and millions more corporate taxpayers. This case touches American citizens in a direct and tangible way: it affects their money, and it affects the way the government may take it away from them.

CONCLUSION AND REQUEST FOR RELIEF

This case affects many Americans and raises core constitutional concerns. Petitioner requests that this Court grant certiorari.

Alternatively, Petitioner requests that this court remand the case to the Federal Circuit with directions to issue a written opinion addressing the application of this Court's decisions in *Pennhurst State School & Hosp.* and *Brushaber* on the Fifth Amendment issue, and to address the Uniformity Clause issue as a matter of first impression.

Respectfully Submitted,

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2006-5123

LINDA ROSENBERG,

Plaintiff-Appellant

v.

UNITED STATES,

Defendant-Appellee.

Judgment

(Filed May 8, 2007)

On Appeal from the United States Court of Federal Claims

in CASE NO(S). 05-cv-1272

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36

Per Curiam (MICHEL, Chief Judge, MAYER an GAJARSA, Circuit Judges)

ENTERED BY ORDER OF THE COURT

DATED MAY - 8 2007 /s/ Jan Horbaly
Jan Horbaly, Clerk

In the United States Court of Federal Claims

No. 05-1272T
Filed August 3, 2006
TO BE PUBLISHED

LINDA ROSENBERG, Plaintiff, v. THE UNITED STATES, Defendant.	Excise Tax, 26 U.S.C. §§ 4251, 4252; Illegal Exaction; Implied Contract; Motion to Dismiss, RCFC 12(b)(1); RESTATEMENT (SECOND) OF CONTRACTS, § 346 cmt. 2; Takings Clause, U.S. CONST. amend. V; Uniformity Clause, U.S. CONST. art I, § 8, cl. 1.

Sheldon H. Sloan, Lewis, Brisbois, Bisgarrd & Smith, San Diego, California, counsel for Plaintiff. **R. Gaylord**, Lewis, Brisbois, Bisgarrd & Smith, San Diego, California; **Richard F. Scruggs** and **Sydney A. Backstrom**, Scruggs Law Firm, P.A., Oxford, Mississippi; **Mark Griffin**, Law Offices of Mark Griffin, Orange, Ohio; **Randy J. Hart**, Cleveland, Ohio; **R. Eric Kennedy** and **Daniel P. Goetz**, Weisman, Kennedy & Berris Co., L.P.A., Cleveland, Ohio; and **Michael Moore**, Phelps Dunbar LLP, Jackson, Mississippi, of counsel.

Benjamin C. King, Jr., United States Department of Justice, Tax Division, Washington, D.C., counsel for Defendant.

MEMORANDUM OPINION AND FINAL ORDER

BRADEN, Judge.

I. BACKGROUND.

In 1898, Congress imposed the first tax on telephone service. *See OfficeMax, Inc. v. United States,* 428 F.3d 583, 585 (6th Cir. 2005) (discussing 26 U.S.C. § 4251, the statute at issue in this case). This excise tax[1] ("tax" or "excise tax") was imposed to reduce the federal budget deficit from the Spanish-American War. *See OfficeMax,* 428 F.3d at 585. It was repealed in 1902. *Id.* The tax was re-instituted during World War I and repealed again in 1916. *Id.* The tax returned a third time during the Great Depression and has been viable ever since. *Id.; see also* 42 U.S.C. § 4251.

Section 4251 of Title 26 of the United States Code authorizes the Internal Revenue Service ("IRS") to collect taxes on toll telephone service:

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[1] An excise tax is an indirect tax on an activity related to property, including a tax on services. *See Union Elec. Co. v. United States,* 363 F.3d 1292, 1303-04 (Fed. Cir. 2004) ("[T]he EPACT tax is an excise tax because its incidence falls on *particular activity related to property* – here the *purchase of enrichment services* or enriched uranium – as *opposed to the mere ownership of property.*" (emphasis added)).

(a) Tax imposed

(1) *There is hereby imposed on amounts paid for communications services a tax* equal to the applicable percentage of amounts so paid.

(2) Payment of tax. The tax imposed in this section shall be paid by the person paying for such services.

(b) Definitions. For the purposes of subsection (a) –

(1) Communications services. The term "communications services" means –

(A) local telephone service;

(B) *toll telephone service*; and

(C) teletypewriter exchange service.

(2) Applicable percentage. The term "applicable percentage" means 3 percent.

26 U.S.C. § 4251 (emphasis added).

Congress defined "toll telephone service" as:

(1) A telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance *and* elapsed transmission time of each individual communication and (B) the charge is paid within the United States. . . .

26 U.S.C. § 4252(b) (emphasis added).

When Congress enacted section 4252 in 1965, American Telephone and Telegraph Company ("AT & T"), the only provider of long distance telephone service, charged a toll on long distance calls based on both time and distance. *See OfficeMax,* 428 F.3d at 596. Subsequent deregulation resulted in the entry of new long distance telephone service providers. *Id.* By the 1990's, AT & T and some of the new providers began to charge a flat, per-minute toll for long distance telephone service that did not include a distance factor. *Id.*

In recent years, a number of corporations have successfully argued that the IRS does not have authority under 26 U.S.C. § 4251 to collect taxes on toll telephone service billed solely on the basis of time, instead of elapsed time *and* distance. *See, e.g., Reese Bros., Inc. v. United States,* 447 F.3d 229 (3rd Cir. 2006) (upholding the trial court's grant of summary judgment against the IRS, because the definition of "toll telephone service" in 26 U.S.C. § 4252 only applies to toll telephone service charged on elapsed time and distance, not elapsed time alone); *Fortis, Inc. v. United States,* 447 F.3d 190 (2d Cir. 2006) (same); *OfficeMax,* 428 F.3d 583 (same); *National R.R. Passenger Corp. v. United States,* 431 F.3d 374 (D.C. Cir. 2005) (same); *Am. Bankers Ins. Group v. United States,* 408 F.3d 1328 (11th Cir. 2005) (reversing the district court's grant of summary judgment in favor of the IRS on the same grounds); *Hewlett-Packard Co. v. United States,* No. C-04-03832 RMW, 2005 WL 1865419, 2005 U.S. Dist. LEXIS 19972

(N.D. Cal. August 5, 2005) (granting summary judgment against the IRS on the same grounds); *Am. Online v. United States,* 64 Fed. Cl. 571 (2005) (same); *Honeywell Int'l, Inc. v. United States,* 64 Fed. Cl. 188 (2005) (same).

On October 20, 2005, in response to the United States Court of Appeals for the Eleventh Circuit's decision in *American Bankers,* the IRS released a Notice announcing that:

> The government did not seek review by the United States Supreme Court in *American Bankers Insurance Group.* Nevertheless, the government will continue to litigate this important issue. The government is prosecuting appeals in five different circuits.
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> * * *
>
> *This notice confirms that the Service will continue to assess and collect the tax under [26 U.S.C.] § 4252 on all taxable communications services, including communications services similar to those at issue in the cases.* Collectors should continue to collect the tax, including from taxpayers within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit.
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> * * *
>
> *Taxpayers may preserve any claims for overpayments by filing administrative claims for refund with the Service pursuant to [26 U.S.C.] § 6511. Taxpayers are advised, however, that these claims, including claims for*

> *which appellate venue would lie in the United States Court of Appeals for the Eleventh Circuit, will not be processed while there are pending cases in other United States Courts of Appeals.*

Internal Revenue Service Notice 2005-79, 2005 WL 2671273, 2005 IRB LEXIS 407 (October 20, 2005) (emphasis added).

II. RELEVANT FACTS AND PROCEDURAL HISTORY.[2]

During the past six years, Plaintiff has paid the excise tax collected on long distance toll telephone service, pursuant to 26 U.S.C. § 4251. *See* Compl. ¶¶ 15, 16. Plaintiff, however, has not filed a claim for a refund of this tax from the IRS. *Id.* ¶ 102. Nevertheless, on December 19, 2005, Plaintiff filed a Complaint, on behalf of herself and of a putative class, in the United States Court of Federal Claims seeking a refund. The Complaint challenges both the IRS's

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[2] The relevant facts recited herein were derived from: the December 9, 2005 Complaint ("Compl."); the Government's February 2, 2006 Motion to Dismiss ("Gov't Mot. Dis."); Plaintiff's March 21, 2006 Memorandum Contra Defendant's Motion to Dismiss and Cross-Motion for Partial Summary Judgment as to Liability ("Pl. Resp."); the Government's April 27, 2006 Reply Brief to Plaintiff's Opposition of Defendant's Motion to Dismiss ("Gov't Reply"); the Government's May 12, 2006 Motion to Strike or in the Alternative for a Stay ("Gov't Mot. Strike"); and the Government's May 25, 2006 Status Report and Notice of Change of Position ("Gov't Status Rep.").

authority to tax toll telephone service billed solely on the basis of time and the IRS's decision to continue collecting this excise tax despite the decision in *American Bankers*. *See* Compl. ¶ 11

The Complaint alleges four claims against the United States ("the Government"). *Id.* ¶¶ 80-103. Claim I alleges that the excise tax at issue was an unlawful taking under the Fifth Amendment to the United States Constitution. *Id.* ¶¶ 81-82. Claim II alleges that the tax violates Article I, Section 8, of the United States Constitution. *Id.* ¶ 90. Claim III alleges that the IRS's collection of the excise tax was an illegal exaction. *Id.* ¶ 94. Claim III also alleges that the IRS breached an implied contract with Plaintiff. *Id.* ¶¶ 94-95. Claim IV does not actually allege a cause of action, but it asserts that the IRS's prospective refusal to process refund claims, while appellate litigation is pending, is tantamount to a waiver of the jurisdictional requirement that taxpayers must file for a refund with the IRS prior to filing suit in the United States Court of Federal Claims. *Id.* ¶¶ 100-01.

On February 17, 2006, the Government filed a Motion to Dismiss Claims I, II, and III, pursuant to RCFC 12(b)(6), and Claim IV, pursuant to RCFC 12(b)(1). *See* Gov't Mot. Dis.[3] On March 31, 2006,

[3] Although the Government's Motion to Dismiss only moves to Dismiss Claim IV for lack of jurisdiction, the Government argues that the court lacks jurisdiction over all four claims. *See* Gov't Resp. 14 ("[T]his Court clearly lacks jurisdiction to consider the claims raised in the complaint"). Nevertheless, the

(Continued on following page)

Plaintiff filed a Memorandum Contra Defendant's Motion to Dismiss and Cross-Motion for Partial Summary Judgement as to Liability. *See* Pl. Resp. On April 27, 2006, the Government filed a Reply that did not respond to Plaintiff's Cross Motion for Partial Summary Judgment. *See* Gov't Reply. On May 12, 2006, the Government filed a Motion to Strike or in the Alternative [to] Stay, Plaintiff's Cross-Motion for Partial Summary Judgment. *See* Gov't Mot. Strike.

On May 26, 2006, the IRS released Notice 2006-50, which stated that the definition in 26 U.S.C. § 4252 does not include communications services for which a toll is charged based only on elapsed time, and not distance. *See* Internal Revenue Service Notice 2006-50, 2006 WL 1452787, 2006 IRB LEXIS 228 (May 26, 2006) ("[A]mounts paid for time-only service are not subject to the tax imposed by [26 U.S.C.] § 4251"). On May 25, 2006, the Government filed a "Status Report and Notice of Change of Position," advising the court that if jurisdiction is exercised in this case, the Government intends to proceed in accordance with Notice 2006-50. *See* Gov't Status Rep. at 1.

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court considers the Government's Motion as filed under RCFC 12(b)(1) as to all four of Plaintiff's claims.

II. DISCUSSION.

A. Jurisdiction.

The United States Court of Federal Claims has "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act, however, is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan,* 424 U.S. 392, 398 (1976). Therefore, in order to pursue a substantive right, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages for the court to have jurisdiction. *See Todd v. United States,* 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act."); *see also Roth v. United States,* 378 F.3d 1371, 1384 (Fed. Cir. 2004) ("Because the Tucker Act itself does not provide a substantive cause of action, however, a plaintiff must find elsewhere a money-mandating source upon which to base a suit."); *Khan v. United States,* 201 F.3d 1375, 1378 (Fed. Cir. 2000) ("[T]he plaintiff 'must assert a claim under a separate money-mandating

constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.'" (quoting *James v. Caldera,* 159 F.3d 573, 580 (Fed. Cir. 1998))).

Before the United States Court of Federal Claims can exercise jurisdiction over a tax refund claim, however, the plaintiff must first file a tax refund claim with the IRS:

> *No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax* alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary,* according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a) (emphasis added).

B. Standard Of Review.

The court's consideration of motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim is "necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *see also Fisher v. United States,* 402

F.3d 1167, 1173 (Fed. Cir. 2005) ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a Rule 12(b)(1) dismissal – the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act."); *see also* RCFC 12(b)(1). Moreover, it is well established that, "in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed. Cir. 1988) ("[O]nce the [trial] court's subject matter jurisdiction [is] put in question, it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction.").

C. The Court's Resolution Of The Government's Motion to Dismiss.

1. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Illegal Exaction Claim.

a. The Government's Argument.

The Government argues that the court does not have subject matter jurisdiction, because Plaintiff has

not filed a claim for a refund with the IRS as required by section 7422(a) of Title 26 of the United States Code. *See* Gov't Reply at 7. Additionally, the Government argues that the IRS does not have the power to waive the jurisdictional requirements of section 7422(a). *See* Gov't Mot. Dis. at 7. Moreover, the Government argues that even if the IRS could waive the requirements of section 7422(a), it has not done so. *Id.* at 7 ("Notice [2006-50] does not contain any waiver. The Notice expressly provides that taxpayers who want to contest the IRS position, and recover a refund of [26 U.S.C.] § 4251 excise tax paid, 'should file a claim for refund.'").

b. Plaintiff's Response.

Plaintiff responds that section 7422(a) does not prevent the court from exercising jurisdiction over the illegal exaction claim, because the IRS waived the requirement that plaintiff file a claim for a refund by refusing to process refund claims based on section 4251. *See* Pl. Resp. at 36 ("Courts have recognized a futility exception where an agency like the IRS has announced, and followed, a policy of judicial non-acquiescence.").

In addition, Plaintiff argues that section 7422(a) does not apply either to the Takings Clause claim or the Uniformity Clause claim, because they are causes of action that can be pursued "independent of the tax refund statute." *See* Pl. Resp. at 27-29 (citing *Cyprus*

Amax Coal Co. v. United States, 205 F.3d 1369 (Fed. Cir. 2000)).

c. The Court's Resolution.

i. 26 U.S.C. § 7422(a) Precludes The United States Court Of Federal Claims From Exercising Jurisdiction Over Plaintiff's Illegal Exaction Claim.

The United States Court of Federal Claims has jurisdiction over tax refund claims where an internal revenue tax is alleged to have been erroneously collected. *See* 28 U.S.C. § 1491(a)(1). Section 7422(a) of Title 26 of the United States Code, however, requires that a plaintiff seeking a tax refund in the United States Court of Federal Claims first file a claim for a refund with the IRS before the court has jurisdiction under 28 U.S.C. § 1491(a)(1). *See* 26 U.S.C. § 7422(a). Plaintiff failed to file such a refund claim with the IRS.

Contrary to Plaintiff's argument, this jurisdictional requirement cannot be waived by either the IRS or the court. *See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982) ("No action of the parties can confer subject-matter jurisdiction upon a federal court."). The court, therefore, does not have jurisdiction over Plaintiff's illegal exaction claim.

ii. 26 U.S.C. § 7422(a) Does Not Preclude The United States Court of Federal Claims From Exercising Jurisdiction Over Plaintiff's Takings Claim, Uniformity Clause Claim, Or Contract Claim.

Section 7422(a), however, does not preclude the United States Court of Federal Claims from exercising jurisdiction over a cause of action that is independent and self-executing, regardless of whether the plaintiff filed a refund with the IRS before initiating suit. *See Cyprus Amax,* 205 F.3d at 1376 (holding that plaintiffs were not required to file a claim for a refund with the IRS before pursuing an independent and self-executing claim based on the Export Clause of the United States Constitution);[4] *Hatter v. United States,* 953 F.2d 626 (Fed. Cir. 1992) (holding that plaintiffs were not required to file a claim for a refund with the IRS before pursuing a claim based on the Judge's Compensation Clause of the United States Constitution).[5]

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[4] The Export Clause of the United States Constitution provides: "no Tax or Duty shall be laid on Article exported from any state." U.S. CONST. art I, § 9, cl. 5.

[5] The Judges' Compensation Clause of the United States Constitution provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

Section 7422(a) does not preclude jurisdiction over Plaintiff's takings claim, because the Takings Clause of the United States Constitution is money-mandating in its own right and, therefore, provides an independent and self-executing cause of action. *See Elkins v. United States,* 229 Ct. Cl. 607, 608 (1981) (holding that the Takings Clause of the Fifth Amendment is money-mandating). Likewise, assuming *arguendo* that the Uniformity Clause is money-mandating, section 7422(a) does not preclude jurisdiction over Plaintiff's claim thereunder, because it would provide an independent and self-executing cause of action. Moreover, section 7422(a) does not preclude jurisdiction over Plaintiff's contract claim, because inherent in every breach of contract claim is an independent right to money damages. *See* RESTATEMENT (SECOND) OF CONTRACTS § 346 cmt. a (1981) (providing that a "breach of contract gives the injured party a right to damages against the party in breach"); *see also Chevron U.S.A., Inc. v. United States,* 71 Fed. Cl. 236, 256-63 (Fed.Cl.2006) (holding that contract claims are inherently money-mandating)

2. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Fifth Amendment Takings Claim.

a. The Government's Argument.

The Government argues that the court does not have jurisdiction over Plaintiff's takings claim,

because Plaintiff has not conceded that the IRS was authorized to collect the tax. *See* Gov't Mot. Dis. at 3 ("Since the complaint alleges that the IRS'[s] collection of the tax was not valid, it fails to set forth a cause of action based on a Fifth Amendment Taking."). The Government asserts that Plaintiff's takings claim is actually a Due Process Clause claim, over which the court does not have jurisdiction because the Due Process Clause is not money-mandating. *See* Gov't Reply at 3 ("[T]he language quoted in plaintiff's opposition only refers to a violation of due process, not a taking.").

b. Plaintiff's Response.

Plaintiff responds that the excise tax "will constitute a taking if 'the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.'" Pl. Resp., 16 (quoting *Brushaber v. Union Pac. RR,* 240 U.S. 1, 24-25 (1916)); *see also* Compl. ¶ 83 ("The IRS'[s] classification of services and taxpayers is arbitrary and capricious such that its collection of the 3% Excise Tax from Plaintiff and the Class did not constitute the exertion of taxation but a confiscation of property.").

c. The Court's Resolution.

The United States Court of Federal Claims has jurisdiction over claims alleged under the Fifth Amendment Takings Clause. *See Murray v. United States,* 817 F.2d 1580, 1583-84 (Fed. Cir. 1987) ("Although the Claims Court has jurisdiction over a taking claim, the more difficult question is whether the [plaintiff] [has] stated such a claim[.]"). To invoke the court's jurisdiction over a takings claim, however, the plaintiff must admit that the Government had authority to take the property. *See Rith Energy, Inc. v. United States,* 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that "an uncompensated [t]aking and an unlawful government action constitute 'two separate wrongs [that] give rise to two separate causes of action,' and that a property owner is free either to sue in district court for asserted improprieties committed in the course of the challenged action or to sue for an uncompensated [t]aking in the [United States] Court of Federal Claims") (quoting *Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358, 1346 (Fed. Cir. 1998)); *Tabb Lakes, Ltd. v. United States,* 10 F.3d 796, 802 (Fed. Cir. 1993) ("[C]laimant must concede the validity of the government action which is the basis of the [t]aking claim to bring suit under the Tucker Act.").

It is well established that the collection of a tax does not constitute a taking within the meaning of the Fifth Amendment. *See Cole v. City of LaGrange,* 113 U.S. 1, 8 (1885) ("[T]he taking of property by taxation requires no other compensation than the

taxpayer receives in being protected by the government to the support of which he contributes [.]"); *see also Mobile County v. Kimball,* 102 U.S. 691, 703 (1880) ("Neither is taxation for a public purpose, however great, the taking of private property for public use in the sense of the Constitution."); *Branch v. United States* 69 F.3d 1571, 1576 (Fed. Cir. 1995) ("Even though taxes or special municipal assessments indisputably 'take' money from individuals or businesses, assessments of that kind are not treated as *per se* takings.").

In this case, Plaintiff has not admitted that the IRS's collection of excise tax on her toll telephone service was authorized. *See* Compl. ¶¶ 6, 35, 95. Therefore, Plaintiff has failed to invoke the court's jurisdiction over the takings claim. *See Rith,* 247 F.3d at 1365. Assuming *arguendo,* that Plaintiff admitted the IRS's actions were authorized, a tax is not a taking. *See Cole,* 113 U.S. at 8.

The court, therefore, does not have jurisdiction over Plaintiff's Takings Clause claim.

3. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Uniformity Clause Claim.

a. The Government's Argument.

The Government argues that Plaintiff's Uniformity Clause claim should be dismissed, because the Uniformity Clause applies to the actions of Congress

in passing a statute, not to the actions of the IRS in administering a statute. *See* Gov't Mot. Dis. at 5.

b. Plaintiff's Response.

Plaintiff responds that the court has jurisdiction over the claim, because "the Uniform Excise Tax Clause is a money-mandating provision." Pl. Resp. at 29. Plaintiff argues that the Uniformity Clause claim should be treated in same manner that the United States Court of Appeals for the Federal Circuit treated the Export Clause claim in *Cyprus Amax,* 205 F.3d at 1373 (holding that the Export Clause is a money-mandating clause of the United States Constitution).

c. The Court's Resolution.

To invoke the jurisdiction of the United States Court of Federal Claims, a plaintiff must identify and plead a separate source of substantive law, *i.e.,* a contract, constitutional provision, federal statute, or regulation, that provides a substantive right to money damages. *See Todd,* 386 F.3d at 1094 ("Jurisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act."). The plaintiff also must demonstrate that the source of substantive law "can fairly be interpreted as mandating compensation by the Federal Government

for the damages sustained." *Mitchell II,* 463 U.S. at 216; *see also Testan,* 424 U.S. at 400.[6] "In the parlance of the Tucker Act cases, that source must be 'money-mandating.'" *Id.*

To determine whether a provision is money-mandating, "the court should entertain and decide the jurisdictional and merits test in a single step in which the trial court determines both the question of whether the provision provides the predicate for its jurisdiction, and lays to rest the question of whether the statute on its merits provides a money-mandating remedy." *Wopsock v. Natchees,* No. 05-1491, ___F.3d___, 2006 WL 1889917, at 3 (Fed. Cir. July 11, 2006) (citing *Fisher,* 402 F.3d at 1172). "If the court's conclusion is that the source *as alleged and pleaded* is not money-mandating, the court shall so declare, and shall dismiss for lack of jurisdiction, a Rule 12(b)(1)

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[6] In discussing the money-mandating requirement of the Tucker Act, the United States Supreme Court has held that: "This 'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. . . . It is enough, then, that a statute creating a Tucker Act right be *reasonably amendable* to the reading that it mandates a right of recovery in damages. While predicate acts to establish a Tucker Act claim will not be 'lightly inferred' . . . a *fair inference* will do." *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472-73 (2003). The United States Court of Appeals for the Federal Circuit has recognized, but not resolved whether the United States Supreme Court, in restating the money-mandating test, has made it less stringent. *See Fisher,* 402 F.3d at 1173-74 (quoting *White Mountain,* 537 U.S. 465). For the purposes of this case, however, it is clear that, under either the new or old formulation, the court does not have jurisdiction.

dismissal – the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act." *Id.* at 1173 (emphasis added).

In this case, the Complaint alleges that the Uniformity Clause mandates the payment of money for the alleged *ultra vires* and nonuniform enforcement of 26 U.S.C. § 4251. *See* Compl. ¶¶ 87-91.

Article I, Section 8, Clause 1 of the United States Constitution provides:

> *The Congress* shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; *but all Duties, Imposts and excises shall be uniform throughout the United States* [.]

U.S. CONST. art. I, § 8, cl. 1 (emphasis added). The Uniformity Clause, therefore, is a limitation on legislative, not executive, action. *See United States v. Ptasynski,* 462 U.S. 74, 80 (1983) ("The Uniformity Clause conditions *Congress'* power to impose indirect taxes." (emphasis added)).

No court has resolved the issue of whether the Uniformity Clause is money-mandating. Indeed the Supreme Court's treatment of the Uniformity Clause has been limited. *See* Nelson Lund, Comment, *The Uniformity Clause,* 51 U. CHI. L. REV. 1193, 1193 (1984) ("The nature and extent of the limitation placed on [Congress' power to tax] by the [U]niformity [C]lause has only been infrequently considered by the

Supreme Court; in no case has the clause been relied upon to invalidate a statute."). Arguably, the Uniformity Clause is money-mandating, because it contains language directly related to a pecuniary interest. *See* U.S. CONST. art. I, § 9, cl. 3. In that respect the Uniformity Clause is like the Export Clause and the Judges' Compensation Clause, which were held by the United States Court of Appeals for the Federal Circuit to be money-mandating, in part, because they contained such language. *See Cyprus Amax,* 205 F.3d at 1374-75 ("both [the Export Clause and the Judges' Compensation clause] speak in absolute and unconditional terms and both protect pecuniary interests"). On the other hand, unlike the Export Clause and the Judges' Compensation Clause, the Uniformity Clause is a limitation on a broad grant of power, rather than a prohibition tied to a specific pecuniary interest.

The issue before the court is not whether the Uniformity Clause mandates the payment of money when Congress, in fact, violates the Uniformity Clause. Rather, the issue before the court is whether the Uniformity Clause, "as alleged and pleaded," is money-mandating. *See Fisher,* 402 F.3d at 1173 ("If the court's conclusion is that the source as *alleged and pleaded* is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction[.]" (emphasis added)).

The Complaint alleges that the IRS's *ultra vires* and nonuniform collection of the tax proscribed in section 4251 violates the Uniformity Clause. *See*

Compl. ¶ 90. The Complaint, however, has not alleged or plead that Congress violated the Uniformity Clause. Accordingly, the court has determined that the Uniformity Clause is not money-mandating as alleged and pled in this case. Therefore, the court does not have jurisdiction over Plaintiff's Uniformity Clause claim.

4. The United States Court of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Implied Contract Claim In Count Three.

a. The Government's Argument.

The Government argues that Plaintiff's contract claim must be dismissed, because the Complaint does not allege evidence of the existence of "mutual intent to contract[,] including an offer and acceptance, [and] consideration[.]" *See* Gov't Mot. Dismiss, 6 (quoting *Hunsaker v. United States,* 66 Fed. Cl. 129, 133 (2005), *aff'd,* 2006 WL 1965066, 2006 U.S. App. LEXIS 17887 (Fed. Cir. July 13, 2006)).

b. Plaintiff's Response.

Plaintiff offers no response to the Government's argument regarding the need to plead the elements of an implied contract.

c. The Court's Resolution.

To invoke the jurisdiction of the United States Court of Federal Claims to adjudicate an implied

contract claim, the plaintiff must allege facts evidencing: "mutual intent to contract[,] including offer and acceptance, consideration, and a Government Representative who has actual authority to bind the Government." *Trauma Service Group v. United States,* 104 F.3d 1321, 1326 (Fed. Cir. 1997). The Complaint, in this case, fails to allege facts evidencing that the Government intended to enter into any contract with Plaintiff. Nor does the Complaint allege facts evidencing an offer, acceptance, or consideration on the part of either party. The court, therefore, lacks jurisdiction over Plaintiff's implied contract claim.

IV. CONCLUSION

For the aforementioned reasons, the Government's Motion to Dismiss is **GRANTED,** without prejudice. In the event that the jurisdictional requirement of section 7422(a) is met, Plaintiff may refile. Accordingly, Plaintiff's Motion for Summary Judgment and the Government's Motion to Strike are **DENIED,** as moot.

IT IS SO ORDERED.

/s Susan G. Braden
SUSAN G. BRADEN
Judge

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006-5123

LINDA ROSENBERG,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

(Filed Jul. 25, 2007)

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 1, 2007.

FOR THE COURT,

/s/ Jan Horbaly

Jan Horbaly
Clerk

Dated: 07/25/2007

cc: R. Gaylord Smith
Ellen P. Delsole

ROSENBERG V US, 2006-5123
(CFC-05-CV-1272)